INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Factual statement, question 1	5
Factual statement, question 2	8
Factual statement, questions 3 and 4	9
Argument, question 1	12
Argument, question 2	18
Argument, question 3	23
Argument, question 4	25
Conclusion	28
Appendix	
A. Statutes	29
Natural Gas Act, 52 Stat. 821, 15 U.S.C. §717-717w	29
Administrative Procedure Act, 60 Stat. 237-244, 5 U.S.C. §§1001-1011	20, 32
B. Northern Natural Gas Co., F. P. C. Gas Tariff —CD-1 rate schedule	35
C. Northern Natural Gas Co., F. P. C. Gas Tariff —IND-1 rate schedule	37
D. Northern Natural Gas Co., F. P. C. Gas Tariff IND-2 rate schedule	39

CITATIONS

CASES: Page

Colorado Interstate Gas Co. v. Federal Power Commission, 324 U. S. 581 ..... 8, 18, 23
City of Hastings v. Kansas-Nebraska Natural Gas Co., — F. P. C. — 98 PUR(NS) 1 24
California Electric Power Co. v. Federal Power Commission, 199 Fed. 2nd, 206, certiorari denied April 13, 1953, # 495, — U. S. —, 97 L. Ed. (Advance, p. 679; 73 Sup. Ct. 794; rehearing denied May 18, 1953, — U. S. —, 97 L. Ed. (Advance, p. 679), 73 Sup. Ct. 936 25
California Electric Power Co., In the Matter of, — F. P. C. —, 89 PUR (NS) 359 25
Colorado Interstate Gas Co., In the Matter of, 8 F. P. C. 313, 82 PUR (NS) 350 25
Federal Power Commission v. East Ohio Gas Co., 338 U. S. 464 17
Interstate Natural Gas Co. v. Federal Power Commission, 331 U. S. 682 16
Missouri ex rel. Barrett v. Kansas Natural Gas Co., 265 U. S. 298 16
National Labor Relations Board v. Pittsburgh Steamship Co., 340 U. S. 498 23
Northern Natural Gas Co. v. State Corporation Commission of Kansas, 169 Kan. 722, 222 P. 2nd, 704, rehearing denied 170 Kan. 341, 225 P. 2nd, 1054 .. 6
Pennsylvania Water and Power Co. v. Federal Power Commission, 343 U. S. 414 25
Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U. S. 83 16
Sanitary District of Chicago v. U. S., 266 U. S. 405 .. 17
U. S. v. Federal Power Commission, 191 Fed. 2nd, 796 21
U. S. v. Federal Power Commission, 345 U. S. 153 .. 22
U. S. v. Public Utilities Commission, 345 U. S. 295 .. 16-25
Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474 22

STATUTES CITED: Page

Natural Gas Act, Act of June 21, 1938, 52 Stat. 821, 15 U. S. C. §§ 717-717w; as amended by Act of February 2, 1942, 56 Stat. 83, 15 U. S. C. § 717f, and Act of July 25, 1947, 61 Stat. 459, 15 U. S. C. § 717f(b) 3
Section 4(e), 15 U.S.C. § 717c(e) 4
Section 19(b), 15 U. S. C. § 717r (b) 4
Administrative Procedure Act, Act of June 11, 1946, 60 Stat. 237, 5 U. S. C. §§ 1001-1011:
Section 10 (e), 5 U. S. C. § 1009 (e) 3
Act of Congress of June 25, 1948, 62 Stat. 928, 28 U. S. C. § 1254(i) 2
General Statutes of Kansas, 1947 Supp. §§ 55-701 to 55-713 6

MISCELLANEOUS:

C. C. H. Federal Administrative, Section 1942, Page 3041 (Note) 20
Kansas Corporation Commission's Orders—
Order dated March 8, 1951 6
U. S. Supreme Court Rule 38, Par. 5 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 381

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 382

NORTHERN NATURAL GAS COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Petitions for Writs of Certiorari to The United States Court of Appeals for the Eighth Circuit.

BRIEF FOR INTERVENERS AS RESPONDENTS IN OPPOSITION

OPINIONS BELOW.

The Order and Opinion of the Federal Power Commission (R. 2257-2314) is reported at — F.P.C. —, 95 P.U.R. (N.S.) 289. The Opinion of the Court of Appeals is reported at 206 F. 2nd 690 (R. 2433-2497).

• • • •

JURISDICTION.

The judgment of the Court of Appeals was entered on July 20, 1953. (R. 2498.)

The petition for a writ of certiorari in Case No. 381 was filed on September 26, 1953; the petition for a writ of certiorari in Case No. 382 was filed on September 28, 1953. Jurisdiction of this court is invoked under 28 U.S.C., Sec. 1254(1), 62 Stat. 928, and 15 U.S.C., Sec. 717r(b), 52 Stat. 831.

QUESTIONS PRESENTED.

1. Whether the authority of the Federal Power Commission in fixing rates of a natural gas company for sales for resale in interstate commerce under the Natural Gas Act, is superior to the authority of a state in that same field.

2. Whether the Federal Power Commission, in its decision fixing a rate for Petitioner (a natural gas company), in allocating the cost of service to jurisdictional sales, has made sufficient findings or conclusions in support of its classification of the cost of property taxes and depreciation, in each instance 50 per cent to the demand component and 50 per cent to the commodity component.

3. Whether the Federal Power Commission has jurisdiction over sales of gas by a natural gas company to a distributing utility where such sales are made in bulk at the city gate under a single contract providing for a volume of gas, all of which is a sale for resale, even though some of such gas, after the sale is consummated at the city gate, may be used by the distributing utility itself and not resold.

4. Whether the Federal Power Commission, under Section 4(e) of the Natural Gas Act, has jurisdiction to suspend the rate, charge, or classification of service for the sale by a natural gas company to a distributing utility where such sale is made in bulk at the city gate under a single contract providing for a volume of gas, all of which

is a sale for resale, even though after such sale is consummated the distributing utility may resell some of such gas for large volume industrial use.

• • • •

STATUTES INVOLVED.

The pertinent provisions of the Natural Gas Act (Act of Congress of June 21, 1938, c. 556, 52 Stat. 821-833; 15 U.S.C. Section 717-717w; as amended) and the pertinent provisions of the Administrative Procedure Act (Act of Congress of June 11, 1946, c. 324, 60 Stat. 237-244; 5 U.S.C. Sections 1001-1011; as amended,) are set out in Appendix A, pp. 29-34 *infra.*

• • • •

STATEMENT.

Petitioner in Case No. 381 is the State Corporation Commission of the State of Kansas, and was an intervener in the proceedings before the Federal Power Commission and a petitioner in the Court of Appeals. The petitioner in Case No. 382, Northern Natural Gas Company, is a "natural gas company" within the meaning of the Natural Gas Act (R. 2261) with its principal place of business in Omaha, Nebraska (R. 13). The Interveners-Respondents on whose behalf this brief in opposition to the issuance of writs of certiorari is filed, are, except the State of Minnesota and the Cities of Minneapolis and St. Paul, utilities which purchase from Northern their respective supplies of natural gas for resale and distribution in the various cities and towns where they respectively have franchises so to do. Each was an intervener in the proceeding before the Federal Power Commission and, by order of the Court, was an intervener in the proceedings in the Court of Appeals (R. 2435). Each is vitally concerned in the disposition of these cases in the Supreme Court.

On March 27, 1950, Northern filed with the Federal Power Commission (Commission) proposed changes (R. 2159-2195) to its then effective F.P.C. Gas Tariff (R. 2069-2123) to effectuate a change in the form of Northern's tariff and to increase the revenues from its rates by approximately $3,200,000 annually (R. 2437). Under Section 4(e) of the Natural Gas Act, 52 Stat. 822, 15 U.S.C. Section 717c(e), (Appendix A, pp. 29-34 *infra*) the Commission suspended such proposed rates for the statutory limit of five months (R. 2215-2220). The operations of Northern in connection with its sale of gas to the distributing utilities were not in any manner changed by the filing of the proposed changes in its F.P.C. Gas Tariff (R. 2445-2448).

On October 26, 1950, Northern filed with the Commission proposed changes (R. 2211-2214) in its then effective F.P.C. Gas Tariff to increase the revenues from Northern's rates by approximately $5,200,000 annually (R. 2437). The Commission likewise suspended such proposed changes for five months (R. 2235-2238).

These two rate filings were consolidated for hearing before the Commission (R. 2237), which rendered its decision and order on June 10, 1952 (F.P.G. Opinion 228, R. 2257-2314) rejecting Northern's proposed form of tariff and rate schedules and allowing Northern's rate increases of approximately $5,100,000 annually based upon a form of tariff and rate schedules prescribed by the Commission.

After application for rehearing (R. 2353-2399) was denied in all respects material hereto (R. 2401-2404), Northern filed a petition for review (R. 10-54) of the Commission's order in the Court of Appeals, pursuant to Section 19(b) of the Natural Gas Act, 52 Stat. 831, 15 U.S.C. Section 717r(b) Appendix A, pp. 29-34 *infra.*) This became Case No. 14706 in the court below.

On December 26, 1951, Northern filed with the Commission proposed changes (R. No. 14733, pp. 61-67) in its then effective tariff to increase its revenues by approximately $10,600,000 annually, which changes were suspended by the Commission (R. No. 14733, pp. 69-73) for five months. At

the hearing thereon Northern's direct showing to justify its contentions in support of the third rate increase was completed with the exception of the rate of return and the hearing was adjourned to a time to be fixed by the further order of the Commission (R. 14733, pp. 30-48). Thereafter the Commission Staff Counsel, on June 26, 1952, filed a motion (R. No. 14733, pp. 84-87) requesting dismissal of such third rate increase filing to the extent of $7,601,853 annually, on the basis that such figure represented issues disposed of by the Commission's order and opinion 228. The Commission sustained this motion, F.P.C. Opinion 233 (R. No. 14733, pp. 157-174) and after application for rehearing (R. 14733, pp. 180-198) was denied (R. No. 14733, pp. 205-213) Northern filed a petition for review of the Commission's order in the Court of Appeals, (R. No. 14733, pp. 1-24) pursuant to Section 19(b) of the Natural Gas Act, 52 Stat. 831, 15 U.S.C. Section 717r(b) (Appendix A, pp. 29-34 *infra*). This became Case No. 14733 in the court below.

On July 20, 1953, such court affirmed the Commission's Opinion and Order No. 228 in case No. 14706 in all respects except as to rate of return, which the Commission had fixed at 5½ per cent. Such court likewise affirmed the Commission's Opinion and Order No. 233 in Case No. 14733.

Northern seeks a writ of certiorari to review four issues, all of which are common to Cases Nos. 14706 and 14733 in the court below. Northern does not seek a writ of certiorari to review Case No. 14743 in the court below, apparently being satisfied with the Court of Appeals' disposition of the issue in that case relating to working capital. (R. 2475-2477). Additional facts will be set out in the argument on each question.

Factual Statement. Question 1.

Northern produces approximately 13 per cent of its total gas supply from its own wells and leases in the Hugoton Gas Field in the State of Kansas, for transportation and

sale in interstate commerce (R. 2436). Northern, for like purposes, also purchases a portion of its gas supply from other producers in the same field.

In carrying out its functions under the law of the State of Kansas relative to production and conservation of natural gas (General Statutes of Kansas, 1947 Supp., 55-701 to 55-713), the Kansas Corporation Commission, after hearing, issued an interim order dated February 18, 1949 (R. 1325-1333) which provided in pertinent part as follows:

> "1. No person, firm or corporation taking gas from the Hugoton Field shall take or cause such gas to be taken out of the producing structures or formations thereof without attributing thereto for purposes of payment to the producers, landowners, leaseowners and royalty owners a fair and reasonable value at the wellhead of not less than eight cents per thousand cubic feet."

Such order was contested by Northern in *Northern Natural Gas Company* v. *The State Corporation Commission of the State of Kansas, et al.*, No. 9133, District Court of Finney County, Kansas. Such court upheld the order (R. 1348-1350) and Northern appealed to the Supreme Court of Kansas, which affirmed the judgment of the District Court (R. 1423-1443), 160 Kan. 722, 222 P. 2d 704 (1950) and denied Northern's motion for rehearing (R. 1485-1491), 170 Kan. 241, 225 P. 2d 1054 (1951).

The Kansas Commission, considering all matters contained in said interim order to have been litigated and determined (R. 1495), issued an order dated February 21, 1951 (R. 1493-1497) and an order nunc pro tunc dated March 8, 1951 (R. 1499-1501), directing in pertinent part as follows:

> "2. That all persons, firms or corporations which have taken gas or caused gas to be taken from the Kansas Hugoton Field since March 1, 1949, or which are taking or causing gas to be taken from said field shall from and after March 1, 1949, attribute to all gas taken (except gas for the operation of leases), for all

purposes, including the payment to producers, landowners, lease owners and royalty owners, the fair and reasonable minimum value of not less than eight cents per thousand cubic feet at the wellhead until the further order of the Commission in the investigation instituted in Docket No. C-164."

Before the Federal Power Commission, Northern, pursuant to the Kansas order, sought allowance for rate making purposes of the state minimum attribution value of eight cents per Mcf at the wellhead for all gas produced by it from such field (R. 1991-2021, 2023-2048). The Federal Power Commission rejected that figure, and, in lieu thereof, allowed Northern for its produced gas from such field the actual costs of such production at the wellhead as determined by such Commission—a figure of about five cents per Mcf (R. 2453). In respect to Northern's produced gas in the Kansas Hugoton Field the dollar difference as claimed by Northern between the 8¢ attribution value fixed by the State of Kansas and the actual costs allowed by the Federal Power Commission is $1,914,574 (R. 2453). Northern did not contend and, of course, could not claim that this sum was incurred by it or that it represents *cost*. Northern, further, did not contend before the Commission or the Court of Appeals that the disallowance of the claimed value would be confiscatory (R. 2452). Further, Northern did not contend before the Commission, or the Court of Appeals, nor did it attempt to show, that sound economic reasons exist for a departure from the actual cost of service basis for fixing just and reasonable rates (R. 2452, 2453).

In any event the undisputed fact recognized by the Circuit Court is that the rates fixed by the Commission and approved by the Court are in excess of 8¢ per thousand cubic feet. (R. 2496)

The Court of Appeals upheld the Commission (R. 2456).

* * * *

Factual Statement, Question 2.

Northern's business consists in part of direct sales for consumptive use and in part of sales for resale (R. 2461). In such case it is necessary to allocate costs of service between sales for resale which are subject to the Commission's jurisdiction and direct sales for consumptive use which are not subject to the Commission's jurisdiction (R. 2461-2462).

In allocating costs the Commission takes cognizance of the demand (capacity or fixed) and commodity (volumetric or variable) components of such costs (R. 2463). One of the ways of accomplishing such allocation is the use of the so-called "demand and commodity" method for allocating costs. The Congress did not prescribe the formula for determining how the interstate wholesale business whose rates are regulated should be segregated from the other phases of the business whose rates are not regulated. Under the Natural Gas Act the Commission is not required to employ any specific allocation formula. In this case, where several classes of services have a common use of the same property, difficulties of separation are obvious. Allocation of costs is not a matter for the slide rule. It involves judgment on a myriad of facts. It has no claim to an exact science. *Colorado Interstate Gas Company* v. *Federal Power Commission,* 324 U.S. 581, 589.

The Commission, using the demand-commodity formula, classified property taxes and depreciation expense 50 per cent to demand and 50 per cent to commodity. This corresponds to the classification of income taxes and return approved by the Supreme Court in the Colorado Interstate case, *supra.*

The Commission, in classifying depreciation 50 per cent to demand and 50 per cent to commodity, said "Every cubic foot of gas which gets into the seller's pipeline market makes use of the pipeline facility. That is the only way in which the gas can get from the place of production to distant points of consumption. Every cubic foot of natural

gas transported must, therefore, bear its fair share of the cost of the transportation facility, which is to say, every cubic foot of gas transported must be assigned some part of the actual depreciation expense." (R. 2285.)

The Commission made further findings of fact classifying depreciation expense 50 per cent to commodity and 50 per cent to demand (R. 2284-2286).

The Commission classified property taxes 50 per cent to demand and 50 per cent to commodity (R. 2287, columns (c), (d) and (e)). While it is true that the Commission does not specifically mention property taxes in its opinion in discussing allocation of costs, it nevertheless made findings with reference to the general necessity for allocating fixed expenses to both capacity and volume. Such findings are directly applicable to property taxes (R. 2283).

The Court of Appeals rejected Northern's basic contention that fixed charges must be allocated 100 per cent to demand (R. 2470).

Factual Statement. Questions 3 and 4.

Each of Northern's rate filings of March 27, 1950, October 26, 1950 and December 26, 1951, contain a proposed rate schedule IND-1 and IND-2 (R. 2170, 2171, 2213, 2214) (Appendix C and D, etc., pp. 37 and 39 *infra*.) Except for the rate level the provisions in each such schedule were the same in each filing.

Rate schedule IND-1 purported to apply to all natural gas delivered by Northern to its gas utility customers for their large volume resales for industrial use only (R. 2170). Rate schedule IND-2 purported to apply to all natural gas delivered by Northern to its gas utility customers for their large volume industrial use only and not for resale. (R. 2171). The rate schedule setting forth the IND-1 and the IND-2 charges provided in paragraph 1 of each schedule, entitled "Availability", as follows:

> "This rate schedule is available to the purchaser hereinafter called the Gas Utility for a community where

> the Gas Utility's distribution system is connected to and receives natural gas from the pipeline system of Northern and where the Gas Utility purchases contract demand under Northern's rate schedule CD-1", (R. 2170, 2171.)

The Commission assumed jurisdiction over Northern's rate schedules IND-1 and IND-2 and suspended each for the full five months (R. 2215-2220, 2223-2228). It is clear from the "Availability" paragraph of each rate schedule that no utility customer could obtain a supply of gas which each schedule purports to cover unless such customer purchases contract demand under Northern's rate schedule CD-1 (R. 2170, 2171) (Appendix B, p. 35, *infra*). It is not disputed that if any part of the gas delivered by Northern is sold by the purchaser to a large industrial user (a sale purportedly covered by the IND-1 rate) or is used by the purchaser (a sale purportedly covered by IND-2) the volumes so used are included as part of the volumes in satisfaction of Northern's contract demand obligation under CD-1 schedule. The service contract fixes the amount of contract demand. It is the maximum amount of gas Northern is obligated to deliver to the customer and which the customer is entitled to receive on any one day. It is all delivered in bulk and received for all purposes; none for any particular purpose known prior to delivery. (R. 2447).

Rate schedules IND-1 and IND-2 are not of themselves complete schedules, but are based upon the CD-1 rate schedule, which Northern does not deny was subject to suspension and is subject to the jurisdiction of the Commission (R. 2445). Additionally, there is actually no rate for the services purportedly made available by the IND-1 and IND-2 rate schedules. Northern's rates are two-part rates consisting of a demand charge and a commodity charge. Admittedly, the IND-1 and IND-2 schedules contain only the commodity charge and reference must be had to the CD-1 schedule for the demand charge. Without reference to the CD-1 schedule the charge for the services purport-

edly available under IND-1 and IND-2 cannot be computed (R. 2447).

In addition, the Commission found that the record conclusively establishes that Northern makes no sales of gas to its utility customers for industrial use only or only for such purchaser's own use. (R. 2245.) The Commission also found that the gas to which schedules IND-1 and IND-2 were intended to apply is actually sold under rate schedule CD-1, which is applicable to sales for resale for residential, commercial and small industrial users, all such sales being subject to the jurisdiction of the Commission (R. 2245).

The factual situation with reference to the sale made by Northern to its customers is clearly set forth in the opinion of the Court of Appeals as follows (R. 2445-2447):

> "It appears that at the time Northern filed its proposed Rate Schedule IND-1 and IND-2 on March 27, 1950, it had for its main line system only one general service rate schedule, identified as its CD-1 schedule for the sale of natural gas to its gas utility customers for all uses. The rate was stated in the CD-1 rate schedule as a two-part rate, consisting of two charges, a demand charge and a commodity charge. The requirements of the utilities under the CD-1 rate schedule were determined by the requirements of their domestic commercial and small volume industrial customers and were purchased for sale for all uses. Northern was making no sales of gas to the utility customers for industrial use only or only for the gas utilities' own use. Northern's gas was delivered to them in one indistinguishable mass to the town border station, at which point the sale was consummated. Title to and control of the gas upon passing through the metering station vests in the gas utility and Northern's control and obligations are terminated. At that time the ultimate disposition of the gas is unknown. From the town border station the gas flows, usually at reduced pressures, into the gas utility's distribution system, where it is resold for residential, commercial and industrial uses. In some customer's systems, the purchased gas is commingled with gas manufactured by the gas utility, with the result that there is no way of

determining the destination of the gas purchased from Northern. At times all of the gas must be used to meet resale customers' requirements, but at other times, during off-peak periods for example, some part of the gas is available for the gas utility's own use or for resale on an interruptible basis for industrial use.

"Northern's operations were not proposed to be and were not in fact altered when it filed rate schedules IND-1 and IND-2. The schedules were created by Northern in the thought that the rates would be put beyond the authority of the Commission to suspend because they were formulated to relate by their terms to separate sales for resale made by Northern to the gas utility customers which were for industrial use only and separate sales to the utility customers which were not for resale. They were inseparably connected to the CD-1 schedule by the fact that they provided on their face that they were available only to gas utilities which purchase 'Contract Demand under Northern's Rate Schedule CD-1'."

"The contract demand is the amount estimated by the purchasing utilities as required to meet firm requirements of their domestic or residential, commercial and small industrial users on peak day. This gas when delivered by Northern is available for all these uses and at no time is gas delivered by Northern for or with the understanding that it is for industrial use only or for the purchaser's own use. No part of the gas is 'earmarked' for any particular customer or use."

ARGUMENT

Question 1.

The only question presented for review by the Kansas Corporation Commission (No. 381) and the first question presented by Northern (No. 382) are identical in substance. They each relate to the effect to be given to an order of the Kansas Corporation Commission directing all producers of natural gas in the Hugoton Field in Kansas to attribute the value of 8 cents per MCF at the wellhead. A correct copy of the order in question is set forth in each of the petitions for the writ of certiorari on pages 8 and 9 of Northern's

petition and on pages 7, 8 and 9 of the petition of the Kansas Corporation Commission.

The various applications for rate increases filed by Northern are set forth in its petition (No. 382) in which, on page 9, it says: "Before the Federal Power Commission, Petitioner, pursuant to the Kansas order, sought allowance *for rate making purposes* of the state minimum conservation price of 8 cents per MCF at the wellhead for all gas produced by it from such field." (Italics supplied)

On page 9 of the petition of the Kansas Corporation Commission is a reference to the fact that the Federal Power Commission disallowed *as an element of cost of gas* the required attribution minimum of 8 cents per MCF at the wellhead * * * on all gas produced by Northern as a producer from the Hugoton Field in Kansas.

Each of the petitioners claims error in the action of the Commission in disregarding for *rate making purposes* the attribution value of 8 cents per MCF of the Hugoton gas.

The petitioner in No. 381, the Kansas Corporation Commission, stated the question as follows:

> "May an attribution value as herein ordered by the State of Kansas as a prerequisite to production, which order concededly is otherwise regulationally valid, be refused uniform operation and effect as a state conservation measure, in a common reservoir 'because of its possible touch upon the Federal Power Commission's rate-fixing powers'?"

The petitioner in No. 382, Northern Natural Gas Company, states the question as follows:

> "Is the Federal Power Commission, *in fixing the rates* of a 'natural gas company,' legally bound to allow such company at the wellhead, for all gas produced by it, the minimum conservation price of 8 cents per thousand cubic feet in compliance with a state conservation order requiring such a minimum price to be attributed at the wellhead to all natural gas produced from a common reservoir in such state?" (Italics supplied).

The Kansas Corporation Commission, on page 18 of its petition, shows that the "refused uniform operation" of the attribution value ordered by the Commission is nothing more or less than the failure of the Federal Power Commission to allow as an element of cost of gas the 8 cents per MCF as the attributed value at the wellhead.

Thus, it will be seen that the only question raised by the Kansas Corporation Commission and the first question presented by Northern Natural Gas Company relates to the action of the Federal Power Commission in refusing to allow as an element of cost of gas which the Commission found was a fictitious item of $1,914,574.00 (Record, 2266).

In other words, the claim of each petitioner is that the Federal Power Commission erroneously refused to allow Northern Natural Gas Company the attribution value or value of the gas which it itself produced in the Hugoton Field *in lieu of the actual cost of production.*

The opinion of the Commission beginning at page 2257 of the Record shows that the Commission did establish a rate which it regarded as sufficient to enable Northern Natural Gas Company to earn a fair return upon what the Commission found to be a fair rate base.

In connection with the Kansas order the Commission made a finding of the fictitious character of the amount claimed as above noted; also it referred to the fact that Northern did not claim that the attribution value represented cost, nor did it claim that the failure to include it as an item of the cost of service would amount to confiscation.

The order of the Kansas Corporation Commission is not addressed to the Federal Power Commission, nor does it on its face make any reference to the rates which Northern should charge for its sales for resale in interstate commerce. These are the only rates which the Commission is authorized to fix and are the only rates with which it purported to deal in the filing of its Opinion No. 228 (Record, pg. 2257).

It will also be noted that the order of the Federal Power Commission undertakes in no way to interfere in any re-

spect with the right of the State of Kansas to regulate production and gathering. All rates fixed by the Commission it is undisputed, were rates for resale in interstate commerce to distributing utilities, all of which are within the exclusive jurisdiction of the Federal Power Commission.

The alleged conflict between Federal and State power which it is claimed was erroneously resolved by the Federal Power Commission and the Court below is introduced into this controversy, not by the terms of either order, but by the *claims* of petitioners that the Power Commission was bound because of the Kansas order to add $1,914,754 to Northern's revenues in prescribing a rate for sales for resale in interstate commerce under the Natural Gas Act. The Commission fixed a rate for all gas sales, not just Hugoton gas. It is of this rate that complaint is made. The question really is: "Is Federal power superior to the power of a state in the interstate rate-making field?"

It is asserted here that neither of these petitioners has by their petition shown that the decision by the Court of Appeals for the 8th Circuit in this case is either in conflict with the decision of another Circuit or that it has decided an important question of Federal law which *has not been heretofore decided* by this Court; or has decided a Federal question in a way probably in conflict with applicable decisions of this Court. (Rule 38, paragraph 5).

On the contrary, the Record shows that the Federal power asserted by the Federal Power Commission under the Commerce clause of the Constitution and the terms of the Natural Gas Act has been sustained as superior to the power of the States in so far as the regulation of interstate commerce is concerned.

Reduced to its simplest terms the claim merely is that the Federal Power Commission was bound in computing Northern's cost of service for rate making purposes to include as an item thereof the so-called attribution value of $1,914,574.00 solely because of the fact that the Kansas Corporation Commission had ordered all producers in the

Hugoton Field to attribute a value at the wellhead of 8 cents per MCF.

That the ruling of the Federal Power Commission and its affirmance by the Court of Appeals is in accord with prior decisions of this Court seems beyond question.

This Court said in *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U.S. 682, that long before the passage of the Natural Gas Act, states could not regulate the price of gas when sold to utility distributing companies for resale. It cited *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.,* 265 U.S. 298; and *Public Utilities Commission* v. *Attleboro Steam & Electric Co.,* 273 U.S. 83. The cases cited referred to the rate making field as one of those fields which the *states could not enter.* Therefore, under those decisions this case would not be reviewable, as the only claims of error of either the Federal Power Commission or the Court of Appeals in so far as this order is concerned, is the failure of the Commission to apply it to the rate making field. There is no claim, nor could there be, that the Natural Gas Act enlarged the field in which states could operate. In fact decisions of this Court involving various questions under the Natural Gas Act have consistently adhered to the proposition that it was enacted to "fill the gap" in regulation which had been created by the decisions of this Court excluding the states from this particular field of rate making. Attleboro, supra, is another case in which regulation of interstate rates for electricity was withheld from either the exporting or importing state. In the case of *United States* v. *Public Utilities Commission,* decided by this Court April 6, 1943, 345 U.S. 295, this Court again adhered to the principle that states were excluded from rate regulation of interstate sales for resale and that the Federal power was paramount. Of the *Attleboro* case, *supra,* the Court said: (Record, p. 2450)

> "In short, that case established what has unquestionably become a fixed premise of our constitutional law but what was not at all clear in 1920, that the Com-

> merce clause forbade state regulation of some utility rates. State power was held not to extend to an interstate sale 'in wholesale quantities not to consumers, but to distributing companies for resale to consumer'."

It was on this basis that the Court of Appeals decided this question in this case and said: (Record, p. 2456)

> "In that state of the federal law there is no room for the exercise of any local power to obstruct or prevent the lawful functioning of the federal agency entrusted with the federal power of regulation. The federal power to regulate the commerce in natural gas derives directly from the constitution and is, of course, the dominant power. To the extent that Congress has entered the field, exercised its power and authorized its Commission to regulate charges by natural gas companies for the gas they produce and sell in interstate commerce for resale, its mandate must prevail. The decisions of the Supreme Court in the Panhandle, Colorado Interstate and Hope cases all turned squarely upon the issue and affirmed that Congress has made such grant of power to the Federal Commission."

Therefore, the decision of the Court of Appeals was consistent with the decisions of this Court announced both before and after the enactment of the Natural Gas Act. It is consistent with the decisions excluding the exercise of state power in the field of fixing rates for interstate sales for resale prior to the enactment of the Natural Gas Act. It is also consistent with the decisions of this Court after the enactment which hold that the delegation of the power to the Commission to regulate interstate sales for resale was exclusive of state action.

Other cases involving the question in addition to the cases cited by the Court of Appeals are *Federal Power Commission* v. *East Ohio Gas Company*, 338 U.S. 464, where this Court said that even before the Natural Gas Act state regulatory power could not reach sales for resale; and *Sanitary District of Chicago* v. *United States*, 266 U.S. 405, where this Court said the power of Congress to remove obstruc-

tions to interstate commerce was superior to the power of a state to enact welfare legislation.

From the foregoing it is clear that the decision of the Court of Appeals is in accord and consistent with prior decisions of this Court involving the controlling principle. Therefore, the claims of Petitioners that a Writ of Certiorari should issue cannot be sustained.

Question 2.

This question it seems to us is briefly,—whether the Federal Power Commission in its decision fixing a rate for Petitioner, (a natural gas company) in allocating the cost of service to jurisdictional sales has made sufficient findings or conclusions in support of its classification of the cost of property taxes and depreciation in each instance 50 per cent to the demand component and 50 per cent to the commodity component?

At the outset it should be noted that the court in *Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U. S. 581, 589 announced that allocation of costs is necessarily a matter of judgment. True, after exercising judgment and determination, mathematical computations complete the answer. Allocation of costs is not, however, an exact science arrived at wholly by mathematics. It is not a matter for the slide-rule. It involves judgment on a myriad of facts.

The expert evidence as to allocation of cost was presented by one witness offered by petitioner and a staff witness. Petitioner concedes that the staff witness on question of allocation of costs was qualified as an expert on the subject. The staff witness testified that property taxes and depreciation should be allocated 50 per cent to demand and 50 per cent to commodity. The commission adopted this allocation of such costs. There was the evidence of the staff witness to support such finding.

In its opinion No. 228 the Commission fully discusses the basic reasoning adopted for allocation of depreciation (R. 2285) Therein it was said:

"Every cubic foot of gas which gets to the seller's pipe line market makes use of the pipe line facility. That is the only way in which the gas can get from the place of production to distant points of consumption. Every cubic foot of natural gas transported must, therefore, bear its fair share of the cost of the transportation facility, which is to say, every cubic foot of gas transported must be assigned some part of annual depreciation expense."

"* * * The assignment of annual depreciation expense between the demand and volumetric functions necessarily is a judgment determination. In our opinion, demand and volumetric functions should be given equal weighting in making this assignment, that is to say fifty per cent of the annual depreciation expense should be assigned to the demand factor and fifty per cent to the volumetric factor. This is consistent with the treatment Northern's witness gave to return (compensation of capital) which he assigned fifty per cent to demand and fifty per cent to volume. Depreciation and return are related items of cost. One is a return of capital while the other is a return on capital. See In the Matter of Atlantic Seaboard Corporation et al, Opinion No. 225, issued April 25, 1952, mimeographed opinion p. 22. Accordingly, we find the allocation of depreciation expense fifty per cent to volume and fifty per cent to demand is proper." (R. 2285, 2286)

Reference is then made to allocation of Administrative and General Expense which the Commission said should be divided in accordance with the method used by the staff "which is consistent with our treatment of this expense in past cases." The proper allocation of total cost of services for the test period was then summarized in a two page table which shows the result of adopting the staff witness method.

Thus we have a Commission finding on the allocation of cost of depreciation and property taxes fully supported by substantial evidence. The Commission's opinion discusses the reason for adoption of such finding.

As was said by Court of Appeals in its opinion

> "The Commission here applies its expert judgment, it has informed the court of the reasons for its action, and the action itself is not so unreasonable that it calls for reversal. The Commission has exercised its 'judgment on a myriad of facts', and it is not for the court to overrule that informed judgment. Further, we do not feel that the demand-commodity formula is so rigid and absolute that the Commission cannot alter it." (R. 2467)

We submit that the record fully discloses substantial evidence to support the Commission's finding and a sufficient discussion in the Commission's decision of the basic principles involved. It should be noted however that in any event the finding and opinion is such that it must be affirmed and sustained under the Natural Gas Act and the Administrative Procedure Act, Section 10(e).

In a letter to the Chairman of the Senate Judiciary Committee, dated October 19, 1945, as found in C.C.H.—Federal Administrative, Section 1942, Page 3041 the Attorney General of the United States commented upon the proposed Section which was adopted as Title 5, Section 1009, (e), U.S.C.A., as follows:

> "This declares the existing law concerning the scope of judicial review. The power of the court to direct or compel agency action unlawfully withheld or unreasonably delayed is not intended to confer any nonjudicial functions or to narrow the principle of continuous administrative control enunciated by the Supreme Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.* (309 U. S. 134). Clause (5) is intended to embody the law as declared for example, in *Consolidated Edison Co.* v. *National Labor Relations Board* (305 U. S. 197). There the Chief Justice said: "Substantial evidence is more than a mere scintilla. It means that relevant evidence as a reasonable mind might accept as adequate to support a conclusion (p. 229) * * * assurance of a desirable flexibility

in adminstrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force" (p. 230).

"The last sentence of this section makes it clear that not every failure to observe the requirements of this statute or of the law is ipso facto fatal to the validity of an order. The statute adopts the rule now well established as a matter of common law in all jurisdictions that error is not fatal unless prejudicial."

Chief Judge Parker has clearly stated the rule in United States vs. Federal Power Commission (C.A. 4th 1951) 191 Fed (2) 796 where he said:

> . . . but it was for the Commission, not the courts, to say what parts of the testimony of the witnesses it would accept and what conclusions it would draw from them. And the rule is well settled that we must affirm its findings if supported by substantial evidence. The rule is no different because the questions involve matters of scientific knowledge and the evidence consists largely of the opinion of experts. The court may not, for that reason, ignore the conclusions of the experts and the Commission and put itself in the absurd position of substituting its judgment for theirs on controverted matters of hydraulic engineering. It is in just such matters that the findings of the Commission, because of its experience and the assistance of its technical staff, should be accorded the greatest weight and the courts should be most hesitant to substitute their judgment for that of the Commission. We deal with a similar question in Travelers' Indemnity Co. v. Parkersburg Iron & Steel Co., 4 Cir., 70 F. 2d 63, 64, where the contention was made that questions of fact dependent upon scientific knowledge should be decided by the court and a verdict directed accordingly. What we said there with reference to such questions being for the decision of the jury applies with even greater force here, where the question is one of substituting our judgment for that of the Commission, a body constituted by law and qualified by experience for dealing with the technical scientific matters involved."

Upon appeal to the Supreme Court the decision of the Court of Appeals was affirmed and it was there said:

> "Subordinate arguments are made bearing partly on the power of the Commission to issue any license for private development and partly on the Commission's exercise of its power in granting this license. The arguments involve technical engineering and economic details which it would serve no useful purpose to canvass here. Once recognizing, as we do, that the Commission was not deprived of its power to entertain this application for a license, we cannot say, within the limited scope of review open to us that the Commission's findings were not warranted. Judgment upon these conflicting engineering and economic issues is precisely that which the Commission exists to determine, so long as it cannot be said, as it cannot, that the judgment which it exercised had no basis in evidence and was devoid of reason."

United States vs. *Federal Power Commission,* 345 U. S. 153

In *National Labor Relations Board* vs. *Pittsburgh SS Co.* 340 U. S. 498, the Court has pointed out that it is not called upon to pass upon the conclusions of the Administrative Board in the first instance or to make an independent review of the review by the Court of Appeals. Certiorari should be granted only in cases involving principles the settlement of which is of importance to the public.

The same rule is announced in *Universal Camera Corp.* v. *National Labor Relations Board* 340 U. S. 474 in which the Administrative Procedure Act and the Taft-Hartley Act were involved. The court said:

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

Here we have the Commission adopting a formula based upon substantial evidence of an expert. In *Colorado Interstate* v. *F.P.C.*, 324 U. S. 589, the United States Supreme Court in discussing this issue said:

> "Congress indeed prescribed no formula for determining how the interstate wholesale business, whose rates are regulated, should be segregated from the other phases of the business whose rates are not regulated. Rate making is essentially a legislative function. Congress to be sure has provided for judicial review of the Commission's orders. But that review is limited to keeping the Commission within the bounds which Congress has created. When Congress, as here, fails to provide a formula for the Commission to follow courts are not warranted in rejecting the one which the Commission employs unless it plainly contravenes the statutory scheme of regulation."

The record here clearly shows that the Commission employed an appropriate cost allocation formula based upon proper and sufficient evidence to arrive at a fair and equitable end result. The results of their allocation were also properly taken into account when determining the level of the rate components prescribed.

It follows that petitioner is not entitled to a review in certiorari of the Commission's finding on the allocation of depreciation and property tax costs as affirmed by the Court of Appeals for the Eighth Circuit.

Question 3.

Northern states, in substance, that:

(1) The decisions of the Commission and the Court of Appeals are in error in holding that "sales to gas utilities for their consumptive use under a separate rate provided for in petitioner's Rate Schedule IND-2 are subject to the Commission's jurisdiction under the Natural Gas Act, Section 1(b) notwithstanding the fact that the utilities con-

sume such gas without resale." (Petition for Certiorari, p. 32.)

(2) The decisions of the Commission and the Court of Appeals are opposed to the decision in *City of Hastings* vs. *Kansas-Nebraska Natural Gas Company,* F. P. C. , 98 PUR (NS) 1, which held that the gas used by the Petitioner City was the subject of a separate sale for consumption and not a sale for resale, and that such sale was therefore not within the jurisdiction of the Commission because of the prohibition of Section 1(b). This holding, according to Northern, was "on factual situation indistinguishable in law" (Petition for Certiorari, p. 32) from that presented here.

The first point is not valid because the Commission found that "Northern makes no sales of gas to utility customers for industrial use only or for such purchaser's own use;" (R. 2262); and the Court of Appeals held that "Northern was making no sales of gas to the utility customers for industrial use only or only for the gas utilities own use" (R. 2446). Thus, there was *no* holding that sales for consumptive use are subject to Commission jurisdiction. On the contrary, the holding was that there were *no sales for such use only.* The issue presented is purely one of fact, as to the character of the sales in question. It is certainly not the practice of this Court to take jurisdiction solely to decide a question of fact, particularly where both the original tribunal and the Court of Appeals have been in full agreement on the question.

The second point is not valid because, as shown here, it was decided that no direct sales for use were made by Northern. In the *City of Hastings* case it was found by the Commission that a separate direct sale of gas was made, which was not a sale for resale. Obviously we have entirely different findings as to the fact situations involved in the case. The Court of Appeals held in the case at bar that "in the absence of proof such as existed in the *City of*

Hastings case of direct sales for industrial use or for the purchasing utilities own use, the statute conferring the jurisdiction to regulate on the Federal Power Commission is controlling" (R. 2249). The Commission, which heard the *City of Hastings* case, felt that the facts were distinguishable. The Court of Appeals agrees. This Court should not be asked to take jurisdiction to determine a question of fact in a case not before it, which is apparently what Northern desires.

Northern claims that the decision of the Court of Appeals, in the instant case, conflicts with a decision of the Federal Power Commission in the Hastings case. This Court does not grant certiorari to resolve such a conflict, even if one exists.

It may also be noted that the decision herein is in conformity with prior decisions of the Federal Power Commission and of the courts. See, *In the Matter of Colorado Interstate Gas Co.*, 8 F.P.C. 313, 82 PUR (NS) 350; *In the Matter of California Electric Power Co.* F.P.C. , 89 PUR (NS) 359; *California Electric Power Co.* vs. *F.P.C.*, 199 F (2) 206, certiorari denied April 13, 1953 No. 495, U. S. , 97 L. Ed. (Advance, p. 679); 73 Supreme Court 794, rehearing denied May 18, 1953, No. 495, U. S. , 97 L. Ed. (Advance, P. 851); 73 Supreme Court 936; *Pennsylvania Water and Power Co.* v. *F. P. C.*, 343 U. S. 414; 96 L. Ed. 1042, 72 Supreme Court 843. *United States* vs. *Public Utilities Commission*, 345 U. S. 295, 97 L. Ed. (Advance p. 635). All these cases are in harmony, in principle, with the decision of the Court of Appeals on this issue of fact.

Question 4.

The discussion above as to the first point raised under Question 3 applies equally to Question 4, since the Court of Appeals and Commission found that no sales were made by Northern for resale for industrial use only.

In addition, the Court of Appeals and the Commission

found that the gas purchased under Rate Schedules IND-1 and IND-2 (appendix C and D, pp. infra) was included as a part of the contract demand purchased under Rate Schedule CD-1 (appendix B, p. infra) (R-2262, 2263, 2446, 2447) and that Rate Schedules IND-1 and IND-2, which were commodity schedules, provided only one part of a two-part rate, the other part of which was Rate Schedule CD-1. Thus, the rate schedules were inseparably connected, and since Rate Schedule CD-1 was *admittedly* subject to the Commission's jurisdiction, the other schedules, which were incomplete without CD-1, must necessarily be subject to the same jurisdiction. In any other view of the case, one part of a two-part rate would be subject to suspension, while the other part would not be (R-2263, 2264, 2447, 2448).

Northern has failed to include its Rate Schedule CD-1 in the Petition for Certiorari herein. The pertinent portions may be found (R. 9000 and 9001) as Appendix B, p. 35, *infra*. That rate schedule, and the service agreements made in connection with it, measure Northern's whole obligation to deliver gas to its customers, for all purposes, including use, and resale for industrial use. Additionally, Rate Schedules IND-1 and IND-2 by their terms have always applied only to "communities where the Gas Utility purchases Contract Demand under Northern's Rate Schedule CD-1" (R. 2170, 2171, 2213, 2214).

It is clear that service under Rate Schedules IND-1 and IND-2 is not available except in connection with service under Rate Schedule CD-1 and that the total charge for gas taken under Rate Schedule IND-1 and IND-2 includes a charge under Rate Schedule CD-1 (R. 117-123). The decision of the Court of Appeals and the Commission, that the rate schedules were inseparably connected, resolves a question of fact and is the only possible decision, in view of these facts.

Therefore, on this phase of the case, petitioner (Northern) has failed to point out any conflict between the decisions of Courts of Appeals of other circuits and the decision in the case at bar, nor any conflict between this decision and any applicable decisions of this Court.

• • • •

CONCLUSION

For all of the foregoing reasons, it is urged that the Petitions for Writs of Certiorari in cases Nos. 381 and 382, be denied.

Respectfully submitted,

DONALD EVANS
222 Equitable Building
Des Moines, Iowa.
Attorney for Respondent,
IOWA POWER AND LIGHT COMPANY.

RAYMOND A. SMITH
301 Park Building
Council Bluffs, Iowa.
Attorney for Respondent,
COUNCIL BLUFFS GAS CO.

GEORGE C. PARDEE
18th and Harney Streets
Omaha, Nebraska.
Attorney for Respondent,
METROPOLITAN UTILITIES DISTRICT OF OMAHA.

VERNON MYERS
Box 778
Sioux City 2, Iowa.
Attorney for Respondent,
IOWA PUBLIC SERVICE COMPANY.

CLARENCE H. ROSS
122 So. Michigan Ave.
Chicago, Illinois.
Attorney for Respondent,
CENTRAL ELECTRIC AND GAS Co.

P. L. FARNAND and
G. T. MULLIN
921 Northwestern Bank Bldg.
Minneapolis 2, Minnesota.
Attorneys for Respondent,
MINNEAPOLIS GAS COMPANY.

CARL W. CUMMINS
330 Minnesota Building
St. Paul, Minnesota.
Attorney for Respondent,
NORTHERN STATES POWER COMPANY.

FRANKLIN M. STONE
Waseca, Minnesota.
Attorney for Respondent,
WESTERN STATES UTILITIES Co.

NORMAN H. NITZKOWSKI
Mankato, Minnesota.
Attorney for Respondent,
MINNESOTA VALLEY NATURAL GAS COMPANY.

GEROGE B. SJOSELIUS
Deputy Attorney General
Attorney for Respondent,
STATE OF MINNESOTA
State Capitol
St. Paul 1, Minnesota.

TIMOTHY P. QUINN
Corporation Counsel
Attorney for Respondent,
CITY OF ST. PAUL
St. Paul, Minnesota.

JOHN F. BONNER
City Attorney
Attorney for Respondent,
CITY OF MINNEAPOLIS
Minneapolis, Minnesota.

NED WILLIS
Perry, Iowa.
Attorney for Respondent,
PERRY GAS COMPANY.

NATURAL GAS ACT.

Appendix A.

[Act of Congress of June 21, 1938, c. 556, 52 Stat. 821-833; 15 U. S. C. §717-717w; as amended.]

AN ACT

To regulate the transportation and sale of natural gas in interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

Necessity for Regulation of Natural-Gas Companies

Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U. S. C. §717 (1946)]

Section 2. When used in this act, unless the context otherwise requires—

• • •

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

Rates and Charges; Schedules; Suspensions of New Rates

Section 4.

* * *

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months, beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require

the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. 717c (1946)]

Section 19. *Rehearing; Court Review of Orders*

* * *

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection

to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347). [52 Stat. (1938); 15 U. S. C. 717r(b) (1946)]

Administrative Procedure Act

[Act of Congress of June 11, 1946, c. 324, 60 Stat. 237-244; 5 U. S. C. §§1001-1011; as amended.]

Section 8. *Initial decisions; conclusiveness; review by agency; submission by parties; contents of decisions; record*

• • •

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. [60 Stat. 242; 5 U. S. C. §1007(b)]

• • •

Section 10. *Judicial review of agency action*

• • •

Scope of Review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) un-

supported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. [60 Stat. 243; 5 U. S. C. §1009(e)]

Appendix B.

NORTHERN NATURAL GAS COMPANY
F. P. C. GAS TARIFF
First Revised Volume No. 2

Second Revised Sheet No. 5
Superseding First Revised Sheet No. 5

RATE SCHEDULE CD-1
CONTRACT DEMAND
TOWN BORDER NATURAL GAS DELIVERY

(1) *Availability.* This rate schedule is available to the purchaser, hereinafter called the Gas Utility, for a community where the Gas Utility's distribution system is connected to and receives natural gas from the pipe line system of Northern, and where the Gas Utility purchases Contract Demand under Northern's Service Agreement for "CD-1" Rate Schedule.

(2) *Applicability and Character of Service:* This rate schedule shall apply to the Contract Demands agreed upon by Northern and the Gas Utility, as set forth in the Executed Service Agreement and in the Index of Communities and Contract Demands in Second Revised Sheets No. 46 through 53 of this Tariff. The capacity provided hereunder as Contract Demand shall be available to the Gas Utility at all times, except as provided in paragraphs (10), (12), (13.1) and any other applicable provisions in the General Terms and Conditions, for delivery of gas by Northern under any of the applicable rate schedules of this Tariff.

(3) *Rate:* The Gas Utility shall pay Northern as follows:

Demand Charge: 4.5¢ per MCF of Billing Demand for each day of the billing period.

(4) *Contract Demand:* The Contract Demand under this Schedule CD-1 shall be that agreed upon by Northern and the Gas Utility as set forth in the Executed Service Agreement and in the Index of Communities and Con-

tract Demands in Second Revised Sheets No. 46 through 53 of this Tariff. The Contract Demand shall be the maximum daily volume of natural gas Northern is obligated to deliver to the Gas Utility and shall be the maximum daily volume of gas the Gas Utility is entitled to receive, except as provided in Paragraphs 9-a) and (10) of the General Terms and Conditions.

• • • • •

Appendix C.

NORTHERN NATURAL GAS COMPANY
F. P. C. GAS TARIFF
First Revised Volume No. 2

First Revised Sheet No. 13
Superseding Original Sheet No. 13

RATE SCHEDULE IND-1
LARGE VOLUME INDUSTRIAL SALES FOR RESALE

(1) *Availability:* This rate schedule is available to the purchaser, hereinafter called the Gas Utility for a community where the Gas Utility's distribution system is connected to and receives natural gas from the pipe line system of Northern, and where the Gas Utility purchases Contract Demand under Northern's Rate Schedule CD-1.

(2) *Applicability and Character of Service:* This rate schedule shall apply to all natural gas delivered by Northern to the Gas Utility for resale in such community for large volume industrial use only. Natural gas delivered to the Gas Utility under this rate schedule shall be subject to interruption as provided in paragraphs (9), (10), (12), (13.1) and any other applicable provisions of the General Terms and Conditions.

(3) *Rate:*

The Gas Utility shall pay Northern for all gas delivered under this rate schedule during the Billing Month 14.6¢ per MCF

(4) *Minimum Bill:* None.

(5) *Prompt Payment Discount:* None.

(6) *Volume to be Billed:* The volume to be billed under this rate schedule shall be the total volume of gas delivered by Northern to the Gas Utility during the billing month for resale to large volume industrial consumers for whom gas is purchased under this rate schedule, as recorded by the individual consumer meters of the Gas Utility, adjusted to the Town Border basis of measurement, if sold on a different measure-

ment basis, as set forth in Section (1-b) of the General Terms and Conditions.

(7) *Applicable General Terms and Conditions:* This rate schedule IND-1 shall be subject to the provisions of paragraphs (1) through (13.11), inclusive, of the General Terms and Conditions of First Revised Volume No. 2 of Northern's F.P.C. Gas Tariff.

Issued by: M. L. Mead, Rate Engineer
Issued on: March 27, 1950

Proposed Effective Date:
April 27, 1950

Appendix D.

NORTHERN NATURAL GAS COMPANY
F. P. C. GAS TARIFF
First Revised Volume No. 2

First Revised Sheet No. 14
Superseding Original Sheet No. 14

RATE SCHEDULE IND-2
LARGE VOLUME INDUSTRIAL SALES FOR USE AND NOT FOR RESALE

(1) *Availability:* This rate schedule is available to the purchaser, hereinafter called the Gas Utility for a community where the Gas Utility's distribution system is connected to and receives natural gas from the pipe line system of Northern, and where the Gas Utility purchases Contract Demand under Northern's Rate Schedule CD-1.

(2) *Applicability and Character of Service:* This rate schedule shall apply to all natural gas delivered by Northern to the Gas Utility for its large volume industrial use only, and not for resale in the community where such Gas Utility is engaged in the local distribution of gas. Natural gas delivered to the Gas Utility under this rate schedule shall be subject to interruption as provided in paragraphs (9), (10), (12), (13.1) and any other applicable provisions of the General terms and Conditions.

(3) *Rate:*

The Gas Utility shall pay Northern for all gas delivered under this rate schedule during the Billing Month 14.6¢ per MCF

(4) *Minimum Bill:* None.

(5) *Prompt Payment Discount:* None.

(6) *Volume to be Billed:* The volume to be billed under this rate schedule shall be the total volume of gas delivered by Northern to the Gas Utility during the billing month for large volume industrial use by the Gas Utility, as recorded by the meters of the Gas Utility,

adjusted to the Town Border basis of measurement, if measured, on a different basis, as set forth in paragraph (1-b) of the General Terms and Conditions.

(7) *Applicable General Terms and Conditions:* This rate schedule IND-2 shall be subject to the provisions of paragraph (1) through (13.11), inclusive, of the General Terms and Conditions of First Revised Volume No. 2 of Northern's F.P.C. Gas Tariff.

This rate schedule IND-2 is included in Northern's F.P.C. Gas Tariff as a matter of convenience to Northern and its Gas Utility customers, although this rate schedule IND-2 covers the sale of natural gas not subject to the rate-making jurisdiction of Federal Power Commission.

Northern reserves the right to change this rate schedule upon sixty days written notice to the Gas Utility and subsequent to such notice the Gas Utility shall have the right upon thirty days advance written notice given to Northern to discontinue, as of the date the revised rate schedule becomes effective, the purchase from Northern of the gas to which this rate schedule is applicable.

Issued by: M. L. Mead, Rate Engineer
Issued on: March 27, 1950

Proposed Effective Date:
April 27, 1950

93

No. 381

FILED
NOV 24 1953
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1953

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

REPLY TO FEDERAL POWER COMMISSION'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JAY KYLE, General Counsel,
208 New England Building,
Topeka, Kansas

LOUIS R. GATES, Special Counsel,
410 Commercial National Bank Building,
Kansas City, Kansas

Attorneys for State Corporation Commission of the State of Kansas, Petitioner.

25-1851

INDEX

	PAGE
Opinions Below	3
Statement	3
Summary of Unwarranted Statements in the Brief of the Federal Power Commission	4
The Cause of the Conflict between State and Federal Authority,	13
Conclusion	18

CITATIONS

CASES:

Cities Service Gas Co. v. Peerless Oil and Gas Co., 340 U. S. 179 (1950)	18
Northern Natural Gas Co. v. State Corporation Commission, 169 Kan. 722, 222 P. 2d 704 (1950) and 170 Kan. 341, 225 P. 2d 1054 (1951)	6
Phillips Petroleum Co. v. State of Oklahoma, 340 U. S. 190 (1950)	18
State of Wisconsin v. Federal Power Commission, 205 F. 2d 706	11

STATUTES:

General Statutes of Kansas 1947 Supp. 55-701 to 55-713, incl.,	7
52 Stat. 821, Sec. 1(b); 15 U. S. C. Sec. 717(b)	13

In the Supreme Court of the United States

OCTOBER TERM, 1953

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

No. 381

REPLY TO FEDERAL POWER COMMISSION'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Opinions Below

The Opinion and Order of the Federal Power Commission (R. V 2257-2314) is reported at 95 P. U. R. (N. S.) 289. The opinion of the United States Court of Appeals for the Eighth Circuit (R. VI 2433-2497) is reported at 206 F. 2d 690.

Statement

The matters relating to jurisdiction, statutes involved, questions presented, summary of proceedings before the Federal Power Commission, short statement of the matter involved, specifications of error to be urged and reasons

relied on for allowance of the writ, have been set out in petition for writ of certiorari filed by this petitioner in cause No. 381, in the Court herein on pages 4 to 15, to which the Court is respectfully referred.

The Federal Power Commission, respondent in cause No. 381, wherein the State Corporation Commission of the State of Kansas is petitioner, filed a cross petition for writ of certiorari in cause No. 469 in the Court herein and on page 3 thereof specifically referred the Court to the brief of the respondent, Federal Power Commission, in opposition to the petition for writ of certiorari of your petitioner in cause No. 381.

Summary of Unwarranted Statements in the Brief of Federal Power Commission

The Federal Power Commission in its brief in opposition to the petition for writ of certiorari, No. 381 by the State Corporation Commission of the State of Kansas, makes a number of unwarranted statements as follows:

1. On page 12 thereof appears the following language of the Federal Power Commission:

> "But there is, in any event, no such infirmity as petitioners suggest. Their contention is in effect merely a revival—and indeed an extension—[6] of the 'fair value' argument which the Commission, with this Court's approval, has consistently rejected."

And in addition there was inserted the following footnote:

> "6. The 8-cent valuation sought to be attributed to the gas produced by Northern is not a competitive price but one *artificially* fixed by the Kansas Commission." (Emphasis supplied.)

Your petitioner, the State Corporation Commission of the State of Kansas, respectfully states to the Court that nowhere in the proceedings before the Federal Power Commission or before the United States Court of Appeals for the Eighth Circuit did your petitioner directly or indirectly or by inference or implication make any argument known as the fair value argument and such statement therefore, is entirely unwarranted as far as your petitioner is concerned. Beyond that, nowhere in proceedings before the Kansas Commission, the Kansas Supreme Court, Federal Power Commission, United States Court of Appeals for the Eighth Circuit, and nowhere before this Court has this petitioner ever contended that the minimum 8¢ order in any respect was a fair field price, going price, maximum price, or competitive price but moreover the Kansas Commission's sole position is that the withdrawal of any gas below the minimum of 8¢ per Mcf at the wellhead from the Kansas-Hugoton field under any or all conditions, except for lease usage, is waste, which is prohibited by the Statutes of the State. (See Petitioner's Petition for Writ of Certiorari, pp. 32-38.)

The determination in arriving at the 8¢ figure was the result of extensive hearings and an abundance of competent evidence before the Kansas Corporation Commission, which order promulgating the 8¢ order was finally upheld by the Kansas Supreme Court in *Northern Natural Gas Co. v. State Corporation Commission*, 169 Kan. 722, 222 P. 2d 704, decided Oct. 7, 1950, and 170 Kan. 341, 225 P. 2d 1054, decided Jan. 6, 1951.

2. Your petitioner, State Corporation Commission of the State of Kansas, further states that nowhere in the proceedings before the Federal Power Commission or in the proceedings before the United States Court of Appeals for the Eighth Circuit did the Federal Power Commission heretofore contend that the 8¢ valuation was one *artificially fixed* by the Kansas Commission and such a contention appears for the *first time* in the footnote on page 12 of the brief filed by the Federal Power Commission, in opposition to the petition for writ of certiorari by your petitioner herein.

In the interim order dated February 18, 1949 (R. III 1328), said order of the State Corporation Commission of the State of Kansas, paragraph 4, reads as follows:

> "4. The Commission has jurisdiction and authority to determine the value of gas at the wellhead in the Kansas Hugoton Field and to require that no gas may be taken out of the producing

structures unless the takers of such gas attribute such value to the gas for purposes of payment to the producer, landowner, leaseholder, or royalty owner, and to fix a minimum wellhead price at which natural gas may be taken from the Kansas Hugoton field, when such determination and requirement or fixing of price is a necessary or appropriate means of giving effect to the intent and purpose of the statutes relating to the production and conservation of natural gas. (G. S. 1947 Supp., 55-701 to 55-713, incl.)"

And on R. III 1345 stated in its Memorandum Opinion accompanying said Order:

"A cheap price placed on any commodity depreciates its usefulness. With the variation and fluctuation in field prices, it is highly conceivable that the prevailing low prices for this irreplaceable natural resource leads to the inescapable conclusion that waste occurs because of the low prices. This we think is contrary to the intent and spirit of conservation laws and practices in this state."

And on R. III 1347 stated in its Memorandum Opinion accompanying said Order:

"We are of the opinion that this Commission has jurisdiction and authority to establish a minimum fixed price at the wellhead in this field when fixing a minimum price is necessary or appropriate regulatory means of giving effect to the intent and purpose of the statute relating to the production and conservation of natural gas. We are of the further opinion that the price of gas being paid generally in the field is inadequate and too low."

Subsequently and after said Order and Memorandum Opinion had been upheld by the Supreme Court of the State of Kansas and on February 21, 1951, the Kansas Commission entered its order (R. III 1495) in part as follows:

> "3. By reason of the full and complete hearings before the Commission and the extensive and thorough judicial review of its Interim Order of February 18, culminating in the Supreme Court decisions above referred to, the Commission considers all matters ruled upon in said Interim Order to have been fully litigated and finally determined."

Jay Kyle, General Counsel for the State Corporation Commission of the State of Kansas, read into the record a statement of the Kansas Commission relative to its attribution order of 8¢ (R. I 254-255).

> "Mr. Kyle: This is a statement of the Kansas Commission relative to its order, the attribution order of 8 cents.
>
> "Presiding Examiner: Will you proceed?
>
> "Mr. Kyle: Yes, sir. I appreciate the opportunity of taking the time of the Examiner at this time to address myself to the position of the Commission, as I have said, relating to the conservation order adopted by the Kansas Commission to establish an equitable conservation program to control rates in the State of Kansas. The attribution order, among other things, provides that no person, firm, or corporation taking gas from the Hugoton gas field of Kansas shall take or cause to be taken out of the producing structures or formations thereof without attributing for every purpose, including payment to

producers, land owners, lease owners, and royalty owners a fair and reasonable value at the wellhead of not less than eight cents per 1,000 cubic feet.

"Such order became effective March 1, 1949.

"On February 21, 1951, the Kansas Corporation Commission entered a further order in connection with the matters involved in the previous action of the Commission, implementing the Commission's earlier order.

"In order to eliminate any confusion about the interpretation by the Kansas Commission of its position and what it thinks is the application of the requirements of the orders issued by it in connection with the taking of gas and the attribution thereto for all purposes, including the payment to producers, land owners, lease owners, royalty owners, and natural gas pipeline companies, I wish to point out that if this order is not to be uniformly and equitably applied, both as to produced as well as purchased gas, the conservation program of the State of Kansas would be destroyed. In fact, we would be powerless to control waste, and that is the very thing the State of Kansas is attempting to do and which must be done.

"In order for those mentioned above to comply with our orders, the orders in Kansas, it is necessary for them to attribute to their own production in Kansas a value of not less than eight cents per Mcf at the wellhead. Any attribution by the Federal Power Commission of a wellhead price of less than eight cents per Mcf in fixing rates for natural gas companies or any other producer in the Kansas portion of the Hugoton Field evades the letter and spirit of the orders of the Kansas Corporation Commission.

"The order of the Kansas Corporation Commission has been upheld by the Supreme Court of our state. Therefore, in the light of the decisions of the Supreme Court of the United States in the Phillips Petroleum case and Peerless Oil & Gas Company case, decided December 11, 1950, we think it is crystal-clear that our action and our interpretation of what it means and the application of the conservation principles for which we have long contended for the control and elimination of waste are valid.

"The regulation applies to all gas taken from the Hugoton gas field in Kansas whether destined for interstate or intrastate consumers.

"Insofar as conservation is concerned, the national interest and the interest of producing States should be our concern. In such circumstances, the State is justifiably concerned with preventing uneconomic dissipation of one of its chief natural resources.

"In the circumstances, the Kansas Corporation Commission must insist that all producers, including natural gas company producers, comply with the orders issued by our Commission."

It is thus apparent from all of the above that the State Corporation Commission of Kansas *did not enter an "artificial" order, but did promulgate one made at the conclusion of extensive hearings and based upon competent evidence and made under the pertinent statutes pertaining to the conservation of natural resources and for the prevention of the waste thereof.* Again, the statement by the

Federal Power Commission that the order was "artificial" was entirely unwarranted.

Again, on page 13 of the Federal Power Commission brief, reference is made to the 8¢ order of the Kansas Corporation Commission as being "artificially" fixed; and again on page 14 the term "artificial" is used.

3. Another unwarranted statement by the Federal Power Commission in its brief in opposition to the petitions for writ of certiorari to the United States Court of Appeals for the Eighth Circuit, in Nos. 381 and 382, on page 14, note 8 states:

> "*State of Wisconsin v. Federal Power Commission*, 205 F. 2d 706 (C. A. D. C.), pending on petitions for writs of certiorari, Nos. 280, 281, 418 this Term, *relied on by petitioners (Pet. in No. 381, p. 29;* Pet. in No. 382, pp. 23-24)." (Emphasis supplied.)

This is a direct misquotation for the reason that on page 29 of the petition for writ of your petitioner, the State Corporation Commission of the State of Kansas, No. 381 appears the following language:

> "*The Court of Appeals* predicates its holding with respect to the applicability of the Kansas Minimum Wellhead Order largely upon the holding by the United States Court of Appeals for the District of Columbia Circuit (R. 2460) in the Phillips case. (205 F. 2d 706.) *Therein lies the basic fallacy*

of the conclusion reached by the Court below in the present proceeding.

"In the Phillips case the Court based its holding, namely that Phillips is subject to the jurisdiction of the Federal Power Commission, upon the specific fact that Phillips' sales of gas are made 'after production and gathering have been completed.' Moreover, in order to make certain that there be no misunderstanding with respect to such holding, the Court of Appeals, in that Phillips case, specifically pointed to the fact that the Peerless decision was not 'relevant' in aid of Phillips, since Phillips' sales were not wellhead sales. (R. 2461.)

"*On the other hand,* the attribution of minimum value, at the wellhead, on all gas taken out of the 'producing structures or formations,' as was the fact in the Peerless (340 U. S. 179) case, and as *is the fact under the Kansas Order,* is inseparably a part of such production of gas."

Thus, it is apparent that it was the Court of Appeals for the Eighth Circuit that relied on the case of *State of Wisconsin v. Federal Power Commission,* supra, and not your petitioner. Again, therefore, the Federal Power Commission has made an unwarranted statement in its brief in opposition to the petition.

4. Another unwarranted statement as far as this petitioner is concerned, appears in the Federal Power Commission's brief, page 16, as follows:

"(b) *Petitioners* also complain of several alleged procedural defects in the portion of the Commis-

> sion's order dealing with the Kansas attribution order, assertedly violative of Sections 8(b) and 10(e) of the Administrative Procedure Act, infra, pp. 30-31." (Emphasis supplied.)

It is respectfully submitted that, neither before the Federal Power Commission, nor before the United States Court of Appeals for the Eighth Circuit, nor in this Court, in the petition for writ of certiorari, has *this petitioner* ever complained of procedural defects. Again this statement is entirely unwarranted.

The Cause of the Conflict Between State and Federal Authority

The Federal Power Commission brought on the conflict between the State and Federal authority.

From and after January, 1951, there existed a judicially determined (*Northern Natural Gas Co. v. State Corporation Commission*, supra) valid conservation order of the State Corporation Commission of the State of Kansas requiring the attribution of a fair and reasonable minimum value of not less than 8¢ per Mcf at the wellhead as a condition precedent for the withdrawal of gas from the producing horizons of the Kansas Hugoton Gas Field. This is a function of production of gas over which the Federal Power Commission does not possess jurisdiction. 52 Stat. 821, Sec. 1(b); 15 U. S. C. Sec. 717(b).

If Northern Natural Gas Company (Northern) had not in good faith been complying with the Kansas Conservation Order the gas would never have been produced and would not have reached interstate commerce over which the Federal Power Commission exercised its jurisdiction in June, 1952, when it entered its order herein, striking down in part this prior existing valid conservation order. (R. V 2257.)

It is contended by this petitioner that the Federal Power Commission cannot defeat valid gas conservation orders of a State through any of its (Federal Power Commission) process of rate making authority, nor by its interference in the production and conservation of natural gas in Kansas over which the State, and the State alone, has exclusive jurisdiction.

Northern bitterly resisted compliance with the Kansas attribution order of 8¢ and the litigation continued through the Courts and was not conclusively decided by the Supreme Court of the State of Kansas until January, 1951 (*Northern Natural Gas Co. v. State Corporation Commission*, supra).

In this connection, it is interesting to note that counsel for the Federal Power Commission in the hearing before the Commission inquired of Mr. Blease, a witness for Northern, concerning whether or not the figures developed

by the 8¢ order were shown on Northern's books on October 1, 1950, such inquiry appears (R. I 194):

> "Mr. Kurtz: But they are not the figures that actually appeared on Northern's books on October 1, 1950; is that correct?
> "The witness: That is correct."

Again at (R. I 195) the following question was asked and answer given:

> "Mr. Kurtz: Does that appear on Northern's books, this figure of $3,166,484?
> "The witness: It does not now so appear."

This merely demonstrates that while Northern was strenuously litigating the question it did not carry this item on the books. That is as far as counsel for the Federal Power Commission seem to have pursued the subject in the record.

Your petitioner, State Corporation Commission of the State of Kansas, in its reply brief filed before the United States Court of Appeals for the Eighth Circuit in civil action No. 14704, called attention to the Court of Appeals the fact that immediately following that conclusive decision of the Kansas Supreme Court in January, 1951, that Northern pursued different tactics.

This matter was set out in the reply brief of your petitioner filed before the United States Court of Appeals for the Eighth Circuit in the following language:

"On April 27, 1951, Northern began to collect rate increases under statutory bond, which rate increases effectuated the eight-cent minimum price attribution to its own production in compliance with the Kansas Commission's order as finally upheld by the Kansas Supreme Court in January, 1951.[5]

"[5] *Northern Natural Gas Co. v. State Corporation Commission*, 170 Kan. 341, 225 P. 2d 1054."

Therefore, Northern from and after April 27, 1951, to June 11, 1952, when the F. P. C. opinion No. 228 and order was issued collecting under statutory bond, rates sufficient to include the eight-cent minimum price attribution, and the same is reflected on the books of Northern in accordance with Uniform System of Accounts, prescribed for natural gas companies in account No. 242 [6] by F. P. C.

"[6] Account No. 242. Other Deferred Credits. This account shall include advanced billings and receipts and other deferred credit items, not provided for elsewhere; also amounts which cannot be entirely cleared or disposed of until additional information has been received or which should be credited to income or to surplus accounts in the future."

"From and after June 11, 1952, the date of opinion No. 228 and order of F. P. C., rejecting the eight-cent value to be attributed under Kansas Order,[7] Northern was not collecting the minimum value of eight cents per M. c. f. until the order of the Court herein, entered on November 19, 1952, providing that from and after November 27, 1952, the increased rates could be collected under the Court refunding bond, so that from and after November 27, 1952, *again this item of eight cents per M. c. f. of attributed value appears on the books of Northern*

under Uniform System of Account No. 242, and thus once more Northern is in compliance with the Kansas Conservation Order by reason of the stay issued by the Court herein and the refunding bond approved by the Court."

Thus, it is apparent that Northern was obeying a mandate of the Kansas Supreme Court respecting the State conservation order; otherwise the State in its exclusive jurisdiction over the production of natural gas undoubtedly would not have permitted the withdrawals of Northern's owned production of gas from the producing structures of the field and the gas consequently would have never found its way into interstate commerce. *Hence this controversy would never have arisen.*

The Federal Power Commission, by striking down in part this prior existing valid gas conservation order of the Kansas Commission, through invading the field of production which is categorically denied by the Natural Gas Act, was the cause of the conflict between the State Commission and the Federal Power Commission. Now, in this Court the Federal Power Commission suggests that a conflict does not exist.

Conclusion

The Federal Power Commission's brief in opposition to the Petition for a Writ of Certiorari, entirely ignores the case of *Cities Service Gas Co. v. Peerless Oil and Gas Co.*, 340 U. S. 179 (1950) l. c. 188 cited in the Petition for Writ of Certiorari (p. 27) filed by your petitioner herein, wherein this Court among other things stated:

> *"The price regulation applies to all gas taken from the field, whether destined for interstate or intrastate consumers."* (Emphasis supplied.),

and likewise entirely ignored the portion of the opinion of *Phillips Petroleum Co. v. State of Oklahoma*, 340 U. S. 190 (1950) l. c. 192, cited in the Petition for Writ of Certiorari (p. 23) filed by your petitioner herein, wherein this Court, among other things stated:

> *"In a field which constitutes a common reservoir of gas, the Commission must be able to regulate the operations of all producers, or there is little point in regulating any."* (Emphasis supplied.)

The State Corporation Commission of the State of Kansas in the case at bar was exercising its jurisdiction over Northern *as a producer* taking gas from the *same common reservoir of gas* referred to in the Oklahoma cases just above mentioned in this conclusion.

Therefore since no reasons appear to the contrary the Writ should be granted.

Respectfully submitted,

JAY KYLE, General Counsel,
203 New England Building,
Topeka, Kansas

LOUIS R. GATES, Special Counsel,
410 Commercial National Bank Building,
Kansas City, Kansas

Attorneys for State Corporation Commission of the State of Kansas, Petitioner.

□

25-1831